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**IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1943**

ELMORE L. WESTGATE,
Petitioner,

vs.

FRED G. TIMMER, Receiver of
the Direct Refinery Stations,
BERTHA L. WESTGATE, CLAIRE
C. REYNOLDS and UNITED STATES
OF AMERICA,
Respondents.

**BRIEF OF RESPONDENT BERTHA L. WESTGATE IN
OPPOSITION TO PETITION OF ELMORE L. WEST-
GATE FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF MICHIGAN**

BERTHA L. WESTGATE,
Respondent.

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AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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Now comes Bertha L. Westgate and respectfully sub-
mits the following as her brief in opposition to the within
petition for writ of certiorari.

**SUPPLEMENTAL AND COUNTER-STATEMENT OF
THE MATTER INVOLVED**

(Figures in parentheses refer to pages of printed record
unless context clearly indicates otherwise).

On August 10, 1937, when Bertha L. Westgate com-
menced an action in Kent County, Michigan, for divorce
from petitioner, the latter was engaged in the retail opera-
tion of a chain of gasoline stations, and in accompanying

wholesale business under the name of Direct Refinery Stations. To combat the attempt of Mrs. Westgate to prove petitioner's interest in said business, immediately after August 10, 1937, he commenced to do business in the names of certain of his employes by the names of Howard K. Drake, Nellie Drake, Leroy Smith, and others. The methods which he used were characterized by the trial judge as "fraud, trickery and deceit," and in this finding the Michigan Supreme Court concurred (17-18). On November 30, 1938, the trial judge awarded to Mrs. Westgate as of August 10, 1937, one-half of the petitioner's right, title and interest in and to all of the properties, moneys, bank accounts, assets and business known as the Direct Refinery Stations and in the wholesale business connected therewith (24). The decree of the court left open the question as to what the extent of Mrs. Westgate's interest in the business was, so that further proceedings became necessary to determine that question.

On January 7, 1939, after petitioner had ignored the demand of Mrs. Westgate that he disclose his interest in said business, Mrs. Westgate filed a petition for the appointment of a receiver of the Direct Refinery Stations business and for other relief, and a receiver was appointed on February 3, 1939. In the civil proceeding thereafter, Mr. Michael Garvey, who was petitioner's attorney, represented also the petitioner's employes, Mr. Howard K. Drake, Nellie Drake, Leroy Smith and others. In their behalf he prepared pleadings which claimed for them the ownership of the business and a substantial part of its assets (91), and then in the petitioner's behalf Mr. Garvey prepared pleadings which alleged that the representations made as to ownership by his employes were true (80). However, on January 18, 1941, the court decreed that the petitioner was the sole owner of the Direct Refinery Stations business and the properties connected therewith, which had been put in the names of petitioner's employes (1476). The decree of the lower court was affirmed by opinion of the Supreme Court filed May 18, 1943, and decree of the Supreme Court made June 25, 1943.

During the time that the petitioner claimed that he did not own the Direct Refinery Stations business, — and in

particular from the time that the divorce proceeding was commenced on August 10, 1937, up to the time that control of the business was taken over by the receiver February 3, 1939, — the petitioner exercised complete control over every phase of the Direct Refinery Stations business and its audits. He permitted his wholesale license as a gasoline distributor to lapse and caused licenses to be taken out in the names of Howard K. Drake and Nellie Drake, his employees. Such real and personal properties as he needed in his business he purchased in the names of these employees. However, petitioner was the only one who had an unlimited drawing account from the business, which control he used to withdraw some \$37,500.00 in cash from the business during the period from August 10, 1937, to January 7, 1939; to withdraw upwards of \$28,000.00 from January 7, 1939, to February 3, 1939; and to withdraw upwards of \$12,600.00 after the receiver was appointed (1486-1488). Although Mr. Westgate had a taxable income during 1936 of \$23,949.88, during 1937 of \$69,223.42 and during 1938 of \$137,170.21 (petition, page 15), he made no returns to the Collector of Internal Revenue for 1936 and 1937, and his first complete return for 1938 was filed in December, 1939, and was false, in that he claimed his income was only \$28,389.16 (1597). From the assessments made by the Collector of Internal Revenue against Mr. Westgate in 1939, for income and social security taxes, no appeal was taken and no proofs were introduced by Mr. Westgate to offset the prima facie case which the introduction into evidence of the assessment lists made.

Mrs. Westgate has had no control over the Direct Refinery Stations business, and up to the time that the receiver was appointed had no income from the Direct Refinery Stations business. Up to November 5, 1939, she received temporary alimony, and since that time, by order of the court, she has received \$100.00 per month from the receiver, which payments have been charged against her share of the receivership assets as permanent alimony.

Because of the large withdrawals by Mr. Westgate from the Direct Refinery Stations business of cash subsequent to the date as of which Mrs. Westgate became the owner of one-half of his right, title and interest in the same, the

court decreed that Mr. Westgate should pay over to the receiver \$50,000.00 of the cash which he had received. Up to this date Mr. Westgate has failed and refused to account in any way whatsoever for the moneys so appropriated by him.

ARGUMENT

The argument in this brief we desire to divide into two sections. The first section will consist of an excerpt from the brief filed by the United States with the Supreme Court of Michigan, which excerpt answers the contention of the petitioner that his income taxes should be chargeable against Mrs. Westgate's share of the assets as well as against his share. The second section of the argument will refer to certain specific contentions of the petitioner in his brief and will attempt to show their inaccuracy.

In response to the contention of the petitioner that the taxes levied against him should be paid partially from Mrs. Westgate's share of the assets in the hands of the receiver, we quote as follows from the brief of the United States filed with the Supreme Court of the State of Michigan, pages 64 to 69, inclusive:

"On pages 252-256 of his brief Westgate argues that part of the income taxes, apparently referring to those of 1938, should have been assessed against Bertha L. Westgate, his divorced wife. He contends that since the divorce decree gave her an interest in his property that one-half of any income derived therefrom belonged to Mrs. Westgate and that she and not Westgate was liable for taxes on income derived from such interest. The Commissioner has taxed all of the income to Westgate because he was the one who received it. He owned all the property producing the income at the times when the income was earned with the possible exception of the month of December, 1938. The decree fixing Mrs. Westgate's rights was entered on November 30, 1938. Westgate appealed and this Court affirmed the decree on November 9, 1939.

Westgate v. Westgate, 291 Mich. 18, 292 N. W. 569.

"A rehearing was denied on December 20, 1939. The decree awarded Mrs. Westgate as permanent alimony one-half interest in Westgate's properties as of August 10, 1937. The properties have never been transferred to Mrs. Westgate and Westgate has received all of the income from the properties. He makes no contention that Mrs. Westgate has ever received any part of the same. At least up to November 30, 1938, Westgate not only had a right to the income but actually received it. The wife's claim against him would be for an accounting based upon a debt and obligation due and owing her in the nature of permanent alimony. Westgate continued to collect the income and probably had the right to do so at least up to February 3, 1939, the date the receiver was appointed. At any rate he received and collected all this income under a claim of right. The evidence shows he was in business right up to the time a receiver was appointed (testimony of Donald Glauz) (595).

"Even if Westgate's contentions were correct as to the month of December, 1938, which we do not concede, he has offered no evidence from which the Court can determine how much income Mrs. Westgate was entitled to receive for the month of December, 1938. The evidence does not disclose whether there was a profit or loss in that particular month. The burden rests upon any party attacking an assessment to produce evidence from which not only it can be determined that the assessment was wrong but from which correct and proper determination can be made.

"*Lightsey v. Commissioner*, 63 F. 2d 254 (C.C.A. 4th);

"*Mattern v. Commissioner*, 61 F. 2d 663 (C.C.A.) 9th;

"*Merchants' Transfer & Storage Co. v. Burnet*, 49 F. 2d, 56, 58 (C.C.A. 4th).

“Since Westgate has utterly failed to offer such evidence under any view of the matter the trial court properly upheld the assessments. The undisputed facts in the case show that ever since the divorce was filed Westgate through legal maneuvering has prevented Mrs. Westgate from enjoying any of the income from this property. Since it is admitted by Westgate that Mrs. Westgate has never actually received any of this income, we will briefly consider Westgate’s claim that she received it constructively. *Regulations 94 and 101, Article 42-2*, define constructive receipt of income as follows:

“ ‘Income not reduced to possession. — Income is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. If a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.’

“Mrs. Westgate had no right to draw this income or any part thereof until the decree was affirmed, certainly not before the decree was rendered by the lower court. Westgate and not his wife earned the income. She had no part in earning the income and was not engaged in business with him in 1938. The income was never set aside to her or made available

to her so that it could be drawn upon in 1938 as contemplated by the regulations set out above.

"We do not believe it is necessary for the court to decide whether one-half of the money Westgate made from the business should be labeled alimony. If it was alimony it would not be taxable to Mrs. Westgate under the decisions of *Gould v. Gould*, 245 U. S. 151; *Douglas v. Willcuts*, 296 U. S. 1. On pages 254-256 inclusive of his brief Westgate quotes from the cases of *Helvering v. Fuller*, 310 U. S. 69, and *Pearce v. Commissioner*, 315 U. S. 543. In the *Fuller* case a husband and wife entered into an agreement in contemplation of divorce creating an irrevocable trust the corpus of which was certain stock. All trust income was to go to the wife and children and at the end of 10 years the corpus was to be transferred outright to the wife. An agreement was executed under which the husband was to pay the wife a weekly allowance for a period of five years. Later the divorce was granted and the trust agreement upheld by the court. The Supreme Court held the husband was taxable on the \$40 a week payable under the collateral agreement. Of course the husband would have to receive this sum before paying it over to his wife. However, the corpus of the trust had been transferred to the wife and the husband thereafter owned no interest therein. Income from the corpus was therefore the wife's and not the husband's.

"If there had been an outright transfer of the properties of Westgate or any part thereof to Mrs. Westgate prior to the end of 1938, we concede that income from such properties would be taxable to Mrs. Westgate because she would have either received the income or could have received the same. The situation here is unlike that of the *Fuller* case. Westgate has set up no trust, made no arrangements to provide for Mrs. Westgate and has transferred no property to her as was done in the *Fuller* case. Instead of taking these steps thereby making the income available to Mrs. Westgate, as was the situa-

tion in the Fuller case, Westgate had been doing the exact opposite.

"In the Pearce case a husband purchased an annuity contract for his wife's benefit and the question was whether the husband was liable on income received under the contract. As was the situation in the Fuller case, the income producing property had been transferred to the wife and the case is different from the case at bar for that reason.

"In *North American Oil v. Burnet*, 286 U. S. 417, profit from certain property in dispute were collected by a corporation in 1916, and were taxed to it in that year. In 1922, after considerable litigation the court held that the profits were erroneously received and the corporation was forced to pay over such profits to the original owner. The Supreme Court held that nevertheless these profits were taxable in 1916 instead of 1922, stating (p. 424):

"If a taxpayer receives earnings under a claim of right and without restriction as to its disposition he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent * * *

"In the case at bar Westgate received income through all of 1937 and 1938 under a claim of right if not through actual right. His appeal was pending at the end of 1938. His claim to receive all this income did not fall until November, 1939, when this Court affirmed the decree of the lower Court."

In particular, with respect to the contentions of the petitioner in his argument in his brief as those contentions relate to Mrs. Westgate, we call attention, first, to the statement on page 7 of that brief that no lien of any kind was granted to respondent, Bertha L. Westgate, on the assets of the receivership. Mrs. Westgate has not at any time contended that she had merely a lien upon Mr. Westgate's assets. The decree of November 30, 1938,

made her the owner of one-half of his interest in the business and dated that ownership back to August 10, 1937. The decree of the Circuit Court for the County of Kent was affirmed by the Supreme Court of the State of Michigan on March 16, 1940. Mrs. Westgate's ownership was therefore a completed fact before any lien attached to Mr. Westgate's property by reason of the tax assessments made after the receiver was appointed. On page 8 of petitioner's brief, it is contended that Mrs. Westgate made no move whatever to assert a lien on the assets of the receivership. The statement overlooks the fact that the receivership itself was a part of the proceedings which Mrs. Westgate was using to have determined the exact extent of her ownership in the assets of the Direct Refinery Stations business.

On page 10 of his brief, petitioner makes the following claim:

"It is not just and equitable for her to cause a receiver to be appointed on February 3, 1939 (66) and then have the receiver operate the business for all of these years, and even up to the present time, and then allow respondent Bertha L. Westgate while this income has accrued to take one-half thereof before payment of any tax due to the United States of America."

This statement is misleading because it overlooks the fact that during the entire period between August 10, 1937, and the date of the receiver's appointment on February 3, 1939, Mrs. Westgate had no control over, or income from said business. During that period the petitioner not only retained complete control thereof but also withdrew from the business as much cash as he could to prevent the receiver from acquiring it among the assets of the receivership. Roughly speaking, the amount of cash wrongfully withdrawn by Mr. Westgate from the Direct Refinery Stations business from August 10, 1937, up to and after the appointment of the receiver was about equivalent to the total income tax of the petitioner for the entire year 1937 as well as for 1938 (121). In making this statement, we assume that even petitioner could not

claim that anyone except himself was liable for the penalties assessable against him.

On the same page 10 of his brief, petitioner states:

"No opportunity whatever was given to petitioner to pay the tax claimed by the United States of America. No claim or demand was made from petitioner prior to the appointment of the receiver. Prior to the receivership petitioner did pay and meet his current obligations (1187). If demand for taxes had been made prior to the appointment of the receiver the taxes due to the United States of America would have been paid."

The statement contains an amazing reversal of the obligation of a citizen of the United States with respect to taxes to the United States Government. We do not understand that the burden is on the United States Government to catch taxpayers in failing to make returns and then make claims against them, but rather for the taxpayer voluntarily to comply with the terms of the law. The petitioner's lack of good faith is shown by his failure to make proper returns. That such a course of conduct on his part may now result to his detriment or injury is the fault of no one but himself. Only he is responsible for the fact that during his operation of the business he so depleted its assets that there is not now enough in his share of the assets to pay the taxes properly leviable against him.

On page 11 of petitioner's brief he refers to the disposition which the Supreme Court of Michigan made of the gasoline tax owing. The situation there is slightly different. The operators of the business had collected gasoline taxes in connection with their sales of gasoline. To entitle them to handle such gasoline, bonds were required and furnished to cover the entire amount of the collections involved.

With reference to the *United States Revised Statutes*, Sec. 3466 U. S. C. Title 31, Sec. 191, this respondent contends that said section is not applicable.

On page 12 of his brief petitioner refers to a statement which he appended to his amended return for the year 1938, which he filed in December, 1939. The amended return was received as an exhibit and the statement allowed to remain attached to it. It was no part of the pleadings and no issue was raised with respect to the contention of the petitioner. Throughout the proceedings, no claim was made by the United States Government that the share of the assets belonging to Mrs. Westgate was responsible for the income tax of the petitioner. There was no issue of priority raised or tried.

On page 14 of petitioner's brief, he makes the following statement:

"Petitioner should not be penalized because of the delay in making the claim for the tax, and the respondent Bertha L. Westgate permitted to profit by this delay."

It has been judicially determined that the failure of the petitioner to pay the tax owing was due to both negligence and fraud, and there has been no showing other than the allegation of the petitioner that Mrs. Westgate did in any way profit by his delay. At the time that he was refusing to make proper income tax and social security tax returns, he was carrying out his intention to cheat both Mrs. Westgate and the United States Government. That his efforts have resulted eventually in damage to him and his loss of control of his business cannot be charged to Mrs. Westgate.

On this same page 14 of his brief, petitioner makes the following statement:

"It does not seem equitable and just to attempt to destroy this business in the manner attempted,"

and reference is made to pages 55 and 57 of the record. In spite of the repetition of these allegations there is not a scintilla of proof in the record to support them. Had Mr. Westgate acted in good faith during the proceedings for divorce and made proper returns to the United States Government with respect to his tax obligations, he would

not be in his present position, either personally or with respect to his business affairs.

On page 15 of his brief, petitioner refers to the taxable income which he had during the years 1936, 1937, and 1938, and he states that one-half of this business was owned by the respondent Bertha L. Westgate. He fails to call to the Court's attention that the entire income for 1936 was earned and taxable prior to the time that the divorce proceedings were commenced. For the year 1937 his business records were in such condition that it was difficult to determine what his taxable income was, and during the entire period of 1936, 1937 and 1938 respondent Bertha L. Westgate had no part in the control or management of, or income from, this business.

Further, on page 15, petitioner states:

"Such right according to petitioner will enable him to pay the tax and prevent a ruination and destruction of the business."

With the assets in the receiver's hands valued as of approximately \$68,000.00, with some further assets consisting of cash in banks amounting to perhaps \$19,000.00, and a station inventory of \$15,000.00 as of December, 1939, it is difficult to see how the application of the entire assets to the claim of the United States would enable the petitioner to pay his taxes and at the same time enable him to continue with his business, especially in view of the fact that the amount due to the United States of America for taxes, not including interest, amounts to \$142,926.37. The only result of such an application would be to deprive Mrs. Westgate entirely of the entire properties and assets which she was given by the court as permanent alimony and to enable the petitioner to retain the cash which he wrongfully withdrew from the business and appropriated to his own uses.

With respect to ground number 3, which is argued on pages 15 to 18 of the petitioner's brief, this respondent submits that she has no interest.

The fourth point contains a contention that the action of the United States in making the proof of its claim was

consolidated with the action of the Defendant Bertha L. Westgate, and of the receiver, who was seeking to recover the assets, and that such consolidation was an adoption by the United States of an alleged wrongful search and seizure of the petitioner's books, records and property, and the wrongful use of such books and records in evidence.

The actions were not consolidated, but in order to avoid the necessity of repeating the proof as to what constituted the assets of the petitioner, the proof was arranged in an orderly fashion by the order of the Court (138).

The receiver was appointed February 3, 1939, by the order of the Court (66-68). By this order he was directed to take charge of the books and records of the business. At *that* time petitioner was claiming, and he continued to claim, until the final decree in the Michigan Court, that he did not own the business or the books or records.

No contention is made but what the appointment of the receiver was legal. If the appointment was proper the action was proper.

The record in the Supreme Court of Michigan, beginning with page 5, contains 47 alleged reasons and grounds of appeal, but in no one of these is it alleged that the seizure of the books was wrongful or that they were not properly used in evidence.

After the books were in the custody of the receiver they were open to the access of the United States and of the petitioner. His son, who had been in charge of the office, spent over a hundred hours on these books. The only time he was denied access was on his first visit when the bookkeeper did not know whether he was entitled to access or not.

The receiver testified fully as to the access afforded to the parties (610). Neither Russell Westgate nor the petitioner was sworn as a witness. Neither one of them has denied the statements of the receiver that they had full and free access. On May 24, 1940, after the testimony was taken, the Court ordered all exhibits deposited with

the receiver so that they would be accessible to all attorneys in the case for their use in preparation of briefs.

The statement that the books were tampered with is not justified by the record. The pages of the record referred to show that all that was done was to bring the business records down to the date of the closing of the old business and the institution of the receivership business.

The alleged assistance given by the attorney for the receiver to the Government is well illustrated by reference to page 750 of the record, where the receiver produced an original document when the use of a copy had been previously objected to.

As to the defense of the Government's claim, the position of the receiver was fully stated on pages 1202 and 1203 of the record.

It also appears (1198) that the petitioner's motion to dismiss the Government's claim was made under the objections to the Government's claim filed by the receiver, in which the right was reserved for the benefit of all parties claiming an interest in the estate to make such objections to the Government's claim as they saw fit.

The interests of the Government and of the receiver were to a certain extent parallel in that the Government was trying to establish certain properties as belonging to the receivership so that the income therefrom would be taxable, and the receiver was trying to establish that the same properties belonged to the receivership so that the principal of such properties would be assets of the receivership.

Finally, attention is called to the fact that on page 21 of petitioner's brief, he asks only that the judgment rendered in favor of the United States of America should be reversed and no reversal is asked as to this respondent Bertha L. Westgate. While this is a technical matter, it is submitted that the judgment could not be reversed as to the United States Government and permitted to stand as to respondent Bertha L. Westgate.

CONCLUSION

On the basis of the findings of fact by the Circuit Court for the County of Kent that the petitioner owed the income and social security taxes as alleged, together with penalties for negligence and fraud, and the ownership by Mrs. Westgate of one-half of the Direct Refinery Stations business prior to the existence of any lien in behalf of the United States Government against the assets of Mr. Westgate, it is submitted that the position of the United States was correct in filing its entire claim against Mr. Westgate and assuming that no part of the claim could be levied against the property of Mrs. Westgate.

Respectfully submitted,

BERTHA L. WESTGATE,
Respondent.